

808 KAR 10:210. Registration exemptions - Federal Regulation D.

RELATES TO: KRS 292.410(1)(q), 17 C.F.R. 230.262, 230.501, 230.504, 230.505, 230.508, 239.500

STATUTORY AUTHORITY: KRS 292.500(3), 17 C.F.R. 230.262, 230.501, 230.504, 230.505, 230.508

NECESSITY, FUNCTION, AND CONFORMITY: KRS 292.500(3) authorizes the commissioner to promulgate administrative regulations necessary to carry out the provisions of KRS Chapter 292. KRS 292.410(1)(q) authorizes the commissioner to exempt from KRS 292.330 to 292.390 a transaction for which the commissioner finds that registration is not necessary or appropriate in the public interest or for the protection of an investor. This administrative regulation establishes an exemption for an offer or sale of a security that complies with specified federal regulations and the requirements established in the administrative regulation.

Section 1. (1) Pursuant to KRS 292.410(1)(q), an offer or sale of a security offered or sold in compliance with 17 C.F.R. 230.504 or 230.505, or an offer or sale made exempt by 17 C.F.R. 230.508(a) shall be exempt from KRS 292.340 to 292.390 if the offer or sale meets the requirements established in subsections (3) and (4) of this section.

(2) A person who receives a commission, finder fee, or other remuneration in connection with a sale of a security made pursuant to the exemption established in subsection (1) of this section shall not be relieved of compliance with the requirements of KRS 292.330.

(3) The exemption established in subsection (1) of this section shall apply if:

(a) The issuer does not offer or sell the security by means of a form of general advertisement or general solicitation except as permitted by 17 C.F.R. 230.504. The following shall not constitute "general solicitation" within the meaning of this paragraph:

1. Solicitation of an indication of interest in accordance with the applicable terms and conditions; or

2. An offer to sell a security and the dissemination of written offering material in accordance with the terms of this administrative regulation at least thirty (30) days after the withdrawal of an application by the issuer to register the same class of securities;

(b)1. The issuer reasonably believes that each purchaser of the securities in Kentucky is:

a. Acquiring the security for investment; and

b. Aware of the restrictions imposed on transferability and resale of a security.

2. The basis for reasonable belief may include:

a. Obtaining a written representation signed by the purchaser that the purchaser is acquiring the security for the purchaser's own investment and is aware of the restrictions imposed on the transferability and resale of the security; and

b. Placement of a legend on the certificate or other document that evidences the security stating that the security have not been registered under KRS Chapter 292, and setting forth or referring to the restrictions on transferability and sale of security.

(c)1. The issuer shall file with the office a notice on Form D (17 C.F.R. 239.500):

a. No later than fifteen (15) days after the first sale of a security from or into Kentucky in the case of a transaction pursuant to 17 C.F.R. 230.505; or

b. At least ten (10) business days prior to the first sale of a security from or into Kentucky in the case of a transaction pursuant to 17 C.F.R. 230.504.

2. During the time specified in subparagraph 1 of this paragraph, the office shall not have determined that the exemption provided by this administrative regulation is not available.

3. A notice on Form D shall be manually signed by a person duly authorized by the issuer.

4.a. Information furnished by the issuer to an offeree shall be filed with the notice required by

subparagraph 1 of this paragraph.

b. If the information is altered in a material way during the course of the offering, the office shall be notified of the amendment within fifteen (15) days after an offer using the amended information.

5. At the time of filing of the notice on Form D, the issuer shall pay to the commissioner a filing fee of \$250.

6. If the issuer files an additional document with the United States Securities and Exchange Commission subsequent to its initial filing, a copy of the document shall be filed with the office.

(d)1. An issuer selling a security in reliance on this exemption furnishes written information to a prospective investor to comply with the antifraud provisions of KRS Chapter 292 and applicable federal law.

2. In an offering in reliance on 17 C.F.R. 230.504 to a person who is not an accredited investor, the office shall consider the information provided to a prospective investor in determining whether the exemption established by this administrative regulation is available; and

(e) In a sale to a nonaccredited investor pursuant to 17 C.F.R. 230.504, the issuer and a person acting on his behalf shall have reasonable grounds to believe, and after making reasonable inquiry shall believe, that the purchaser either alone or with his purchaser representative has the knowledge and experience in financial and business matters that he is capable of evaluating the merits and risk of the prospective investment.

(4)(a) Except as provided in paragraph (b) of this subsection, the exemption established in subsection (1) of this section shall not apply if the issuer or a person described in 17 C.F.R. 230.262:

1. Has filed a registration statement which is the subject of a currently effective stop order entered pursuant to a federal or state law within five (5) years prior to the commencement of the offering;

2. Has been convicted within five (5) years prior to commencement of the offering of a felony or misdemeanor in connection with the purchase or sale of a security or a felony involving fraud or deceit including forgery, embezzlement, obtaining money under false pretenses, larceny or conspiracy to defraud;

3. Is currently subject to a federal or state administrative order or judgment entered by that state's securities administrator within five (5) years prior to reliance on this exemption or is subject to a state's administrative order or judgment in which fraud or deceit was found and the order or judgment was entered within five (5) years of the expected offer and sale of a security in reliance upon this exemption;

4. Is currently subject to a state's administrative order or judgment which prohibits the use of an exemption from registration in connection with the purchase or sale of a security; or

5. Is subject to an order, judgment or decree of a court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to an order, judgment or decree of a court of competent jurisdiction, entered within five (5) years prior to the commencement of the offering permanently restraining or enjoining, the person from engaging in or continuing a conduct or practice in connection with the purchase or sale of a security or involving the making of a false filing with a state.

(b) The prohibitions of paragraph (a)1, 2, 3 and 5 of this subsection shall not apply if:

1. The person subject to the disqualification is duly licensed or registered to conduct securities related business in the state in which the administrative order or judgment was entered against the person; or

2. The broker-dealer employing the person is licensed or registered in Kentucky and the Form BD filed with Kentucky discloses the order, conviction, judgment or decree relating to the person.

(c) A disqualification pursuant to paragraph (a) of this subsection shall be automatically waived if the state which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that the exemption be denied.

(d) It shall be a defense to a violation of paragraph (a) of this subsection if the issuer sustains the burden of proof to establish that he did not know, and in the exercise of reasonable care could not have known, that a disqualification under paragraph (a) of this subsection existed.

(5) A failure to comply with a term, condition or requirement established in subsection (2) or (3)(c) or (d) of this section shall not result in loss of the exemption for a new offer or sale to a particular individual or entity if the person relying on the exemption shows:

(a) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity;

(b) The failure to comply was insignificant with respect to the offering as a whole; and

(c) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of this section.

(6) If an exemption is established only through reliance upon subsection (5) of this section, the failure to comply shall be actionable by the commissioner.

(7)(a) An offer or sale which is exempt pursuant to this administrative regulation shall not be combined with an offer or sale exempt under another administrative regulation or KRS Chapter 292.

(b) If an offer or sale fails to comply with all the conditions for this exemption, the issuer may claim the availability of another applicable exemption.

(8) This exemption shall not relieve an issuer or a person acting on behalf of an issuer from the requirement to provide disclosure to a prospective investor to satisfy the antifraud provisions established within KRS Chapter 292.

(9) In a proceeding involving this administrative regulation, the burden of proving the exemption or an exception from a definition or condition shall be upon the person claiming it.

(10) The exemption established in this administrative regulation shall not be available to an issuer for a transaction which is:

(a) In technical compliance with the requirements of this administrative regulation; and

(b) Part of a plan or scheme to evade registration or the requirements of this administrative regulation.

Section 2. Adoption Without Change. The offer or sale of a security offered or sold pursuant to Federal Regulation D is governed by:

(1) 17 C.F.R. 230.262, August 13, 1992;

(2) 17 C.F.R. 230.501, March 20, 1989;

(3) 17 C.F.R. 230.504, June 14, 1996;

(4) 17 C.F.R. 230.505, August 13, 1992; and

(5) 17 C.F.R. 230.508, August 13, 1992.

Section 3. Incorporation by Reference. (1) Form B-D, "Application for Registration as Broker-Dealer", July 1988 edition, is incorporated by reference.

(2) It may be inspected, copied, or obtained at the Department of Financial Institutions, 1025 Capital Center Drive, Suite 200, Frankfort, Kentucky, 40601, Monday through Friday, 8 a.m. to 4:30 p.m.

(3) A copy may also be obtained from the National Association of Securities Dealers (NASD), 1735 K Street, N.W., Washington, D.C., 20006, or a regional NASD office. (11 Ky.R. 1969; eff. 7-9-85; Am. 12 Ky.R. 358; eff. 10-8-85; 1762; eff. 6-10-86; 13 Ky.R. 1112; eff. 1-13-87; 16 Ky.R. 53; 543; eff. 10-8-89; 24 Ky.R. 2186; 25 Ky.R. 91; 313; eff. 6-25-98; TAm eff. 11-7-2012; Crt eff. 2-27-2020.)